

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 967

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LEON SPENCER, APPELLANT

vs.

TEXAS

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APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

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[fol. A]

**IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS**

No. 25040

**THE STATE OF TEXAS**

**vs.**

**LEON SPENCER**

[fol. 1] \* \* \*

[fol. 2]

**IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS**

**INDICTMENT—Returned and Filed February 6, 1964**

**THE GRAND JURORS** for the County of Jefferson, State aforesaid, duly organized as such at the January Term, A.D. 1964, of the Criminal District Court of Jefferson County, in said County and State, upon oath in said Court present that **LEON SPENCER** on or about the 7th day of January One Thousand Nine Hundred and Sixty-four, and anterior to the presentment of this indictment in the County of Jefferson and State of Texas, did then and there unlawfully with malice aforethought voluntarily kill Luvenia Irvine by shooting her with a gun;

**AND THE GRAND JURORS AFORESAID** do further present that prior to the commission of the aforesaid

offense by the said Leon Spencer, to-wit, on the 3rd day of April, 1951, in the Criminal District Court of Jefferson County, Texas, in Cause No. 17832, on the docket of said court, the said Leon Spencer was duly and legally convicted in said last named court of an offense to which the penalty of death is affixed as an alternate punishment, to-wit, Murder with Malice, upon an indictment then legally pending in said last named court and of which said court had jurisdiction; and said conviction was a final conviction and was a conviction for an offense committed by him, the said Leon Spencer, prior to the commission of the offense hereinbefore charged against him as set forth in the first paragraph hereof,

against the peace and dignity of the State.

/s/ W. B. Killebrew  
Foreman of the Grand Jury.

[fols. 3-8] \* \* \*



[fol. 9]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25040

[File Endorsement Omitted]

[Title Omitted]

STIPULATION—Filed July 24, 1964

It is stipulated by the Defendant, Leon Spencer, that he was on the 3rd day of April, 1951, convicted of the offense of murder with malice in Cause No. 17832 in the Criminal District Court of Jefferson County, Texas; that he is the same person convicted in said cause; that said conviction is final; that he actually spent time confined in the Texas Department of Corrections" in carrying out said conviction; that said conviction is of record in Volume 3-B, Page 364 of the Minutes of the Criminal District Court of Jefferson County, Texas; that such offense was committed prior to the date of the present offense on January 7, 1964; that said Court had jurisdiction of said offense and prior conviction, which conviction was and is valid.

This stipulation is intended as a judicial admission for the Court only, and not for presentation to the Jury.

Respectfully submitted,

MICHAEL D. MATHENY  
BILL WALTRIP

By /s/ Bill Waltrip  
Attorneys for Defendant

[fol. 10] . . .

[fol. 11]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S MOTION No. I—Filed July 24, 1964

COMES NOW the defendant, Leon Spencer, appearing in person herein and by and through his attorneys of record, and would respectfully show unto the Court the following:

That prior to the presentation of this motion, this defendant has filed a stipulation and judicial admission and confession that he is the same Leon Spencer that was duly convicted on the 3rd day of April, 1951, in the Criminal District Court of Jefferson County, Texas, in Cause No. 17,832 on the docket of said Court for the offense of murder with malice, an offense to which the penalty of death is affixed as an alternate punishment; the conviction of which was a final conviction and which was prior to the presentation of the indictment in this cause.

WHEREFORE, premises considered, this defendant would show unto the Court that there is no issue for the jury in this cause to pass upon that would require the State to introduce any evidence pertaining to any prior convictions on the part of this defendant without his first taking the witness stand, and would respectfully show unto the Court that the allegations contained in the indictment relating to a prior conviction of this defendant are mere allegations of a historical fact and do not constitute any offense and have been stipulated and are therefore matters that are not necessary for the jury to pass upon.

WHEREFORE, premises considered, this defendant respectfully requests this Honorable Court to enter an order requiring the prosecution to refrain from directly or indirectly introducing any evidence pertaining to any prior convictions of this defendant and further to instruct the prosecution to refrain from directly or indirectly questioning, or mentioning to any juror or prospective juror in this matter any prior conviction of this defendant, and further ordering the prosecution to instruct each witness to be used in this cause to refrain from directly or indirectly mentioning any prior convictions of this defendant. This defendant further respectfully requests the Court to enter an order instructing the District Attorney to refrain from reading any portions of the indictment in this matter which relate to any prior convictions of this defendant.

WHEREFORE, premises considered, defendant prays that this motion be granted in all respects.

Respectfully submitted,

/s/ Michael D. Matheny

/s/ Bill Waltrip  
Attorneys for Defendant

ORDER—July 24, 1964

ON THIS the 24th day of July, 1964, came on to be heard and considered the above motion of the defendant, and after being duly considered by the Court, is hereby overruled, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 13-16] . . .

[fol. 17]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S MOTION TO QUASH—Filed July 23, 1964  
TO SAID HONORABLE DISTRICT COURT:

NOW COMES Leon Spencer, defendant in the above entitled and numbered cause, and without waiving his previous motions filed herein, but insisting upon the same, here and now before entering any plea to the indictment herein, files this his Motion to Quash said indictment, and as grounds and as reasons therefor, respectfully represents and shows the Court as follows:

1.

That said indictment is defective, in that same does not charge the defendant with a violation of any penal law of this State for the reason that the offense attempted to be charged is that of murder with malice and repetition, there being no such criminal offense under the Texas Penal Code.

2.

Said indictment is not styled "The State of Texas" as provided by the Constitution of the State of Texas, Article 5, Section 12.

3.

This defendant excepts to the substance of the whole of the indictment herein because it does not show the date

of the presentment of the indictment by the Grand Jury, and same could be a date prior to the alleged offense charged to have been committed by the defendant.

4.

This defendant further objects and excepts to the whole of said indictment and particularly to the part therein which identified the deceased as "Luvenia Irvine," for the reason that there was no Luvenia Irvine, and the true and correct name of the deceased was Luvenia Spencer, the legal wife of the defendant.

[fol. 18]

5.

Defendant further objects and excepts to the whole of said indictment because it does not show that the Grand Jury returning said indictment was in session at the time said indictment was presented.

6.

This defendant further objects and excepts to the whole of said indictment, and particularly to that portion thereof which reads as follows:

"State of Texas vs. Leon Spencer (c) (j)"  
because same points out and informs the jury that defendant is a member of a minority race and was in jail and shows the disposition of the Grand Jury in returning this indictment, in that it points out that the defendant is of the colored race and was in jail, and said allegations single out this defendant as a member of a minority group.

7.

This defendant further objects and excepts to the whole of said indictment, because the enhancement provisions of said indictment do not show that the alleged prior conviction was subsequent in time to the alleged prior offense, and is therefore void.



## 8.

This defendant further objects and excepts to the whole of said indictment because this defendant was not served with a certified copy of said indictment under the terms and provisions of Article 487, Code of Criminal Procedure, and the Constitution of the State of Texas, Article 1, Section 10.

## 9.

This defendant further objects and excepts to the whole of said indictment because said indictment is duplicitious, vague, indefinite, ambiguous, uncertain, and that from the fact thereof, it is impossible to ascertain just what offense, if any, is attempted to be charged against this defendant, for the reason that apparently this defendant is charged by indictment under the terms and provisions of Article 64 of the Texas Penal Code, which [fol. 19] provides for a special and increased punishment in the event an accused has previously been convicted of a felony offense where an alternate punishment of death is affixed; defendant would respectfully show unto the Court that said Article is unconstitutional and that it denies the accused of due process of law as guaranteed by the Constitution of the United States and the Constitution of the State of Texas in one or more of the following respects (but not limited to):

(a.) Said Article forces the defendant to testify against himself and allows the injection into evidence of prior felony convictions without the defendant first taking the witness stand to testify on his own behalf. Because of the construction of said Statute, it is impossible to erase the prior conviction from the jury's mind in connection with their determination of the guilt or innocence of the defendant in the instant case.

(b.) Said Article constitutes a cruel and unusual punishment under the terms and provisions of the United States Constitution, in that it in effect allows the State to prosecute the defendant again for a prior crime and puts the defendant in double jeopardy.

(c.) Said Article denies the defendant due process of law under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and makes it physically impossible for the defendant to have a fair trial in the instant case, and deprives this defendant of a fair and impartial hearing and thereby denies him due process of law.

(d.) Said Article is in direct conflict with Article 59 of the Texas Penal Code, which provides that increased punishments shall not apply to cases involving capital punishment.

(e.) Article 64 is unclear, vague, and ambiguous in its terms, in that it provides if

"A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life,"

for the reason that before any evidence of prior conviction under the terms and provisions of Article 64 can [fol. 20] be used against this defendant, it must be first shown that he is found guilty in the instant case of murder with malice, an offense to which the penalty of death is affixed as an alternate punishment; and under the accusation in this case, it would be possible for the jury to return a verdict of guilty of murder without malice, which does not carry an alternate punishment of death, and therefore would not allow the introduction of evidence of a prior conviction of a felony offense to which an alternate punishment would be death, and would therefore put before the jury evidence of the defendant's prior convictions without his first taking the witness stand and without such evidence being first admissible for enhancement purposes.

10.

This defendant objects and excepts to the whole of said indictment; and particularly to the second count thereof, which contains allegations of a prior conviction of this



defendant, because same is prejudicial to the rights of this defendant and should be stricken and not read to the jury prior to the time this defendant is convicted of the offense of murder with malice.

WHEREFORE, this defendant prays the Court to quash the whole of the indictment herein, and in the alternative, prays that the second count thereof be quashed.

Respectfully submitted,

BILL WALTRIP  
MICHAEL D. MATHENY

/s/ Michael D. Matheny  
Attorneys for Defendant

*[Duly sworn to by Michael D. Matheny jurat omitted in printing (all in italics)]*

[fol. 21] ORDER—July 24, 1964

ON THIS the 24 day of July, 1964, came on to be heard and considered the above Motion to Quash, and after being duly considered by the Court, is hereby overruled, except, Number 6 which is sustained, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 22-25] . . .

[fol. 26]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S MOTION No. II—Filed July 23, 1964

COMES NOW the defendant, Leon Spencer, appearing in person herein and by and through his attorneys of record, and moves the Court to instruct the prosecution to refrain from attempting to introduce any evidence of any prior convictions of the said Leon Spencer prior to the returning of the jury in this cause of a verdict convicting the defendant, Leon Spencer, of murder with malice.

This defendant further moves the Court to instruct the prosecution to refrain from directly or indirectly questioning or mentioning to any juror or prospective juror in this matter any prior convictions of this defendant.

The said defendant further moves the Court to instruct the District Attorney's office to refrain from reading any portions of the indictment in this matter that refer to any prior convictions on the part of this defendant prior to the time that the jury has returned a verdict of guilty of murder with malice against the said Leon Spencer.

The defendant further moves the Court to require the District Attorney's office to instruct each and every witness to be used in the trial of this case to not refer, directly or indirectly, to any prior convictions of this defendant prior to the time that the jury has returned a verdict convicting this defendant of murder with malice.

This defendant would further show unto the Court that the allegations of prior conviction are mere allegations of a historical fact, and their introduction to the jury prior to the jury's deliberation on his guilt or innocence

in this cause would be so prejudicial to the rights of this defendant that it would deprive this defendant of a fair and impartial hearing in this matter and would thereby [fol. 27] deny him due process of law as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

WHEREFORE, this defendant prays that this Honorable Court sustain this motion in all respects.

Respectfully submitted,

/s/ Michael D. Matheny

/s/ Bill Waltrip  
Attorneys for Defendant

ORDER—July 24, 1964

ON THIS the 24th day of July, 1964, came on to be heard and considered the above motion of the defendant, and after being duly considered by the Court, is hereby overruled, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 28-37] \* \* \*

[fol. 38]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S SPECIAL PLEA TO THE JURISDICTION No. II  
—Filed July 23, 1964

COMES NOW the defendant, Leon Spencer, appearing in person herein and by and through his attorneys of record, and prior to his making any plea to the indictment on file herein, makes and files this his Special Plea to the Jurisdiction of this Court, and would respectfully show unto the Court the following:

1.

This defendant is charged by indictment under the terms and provisions of Article 64 of the Texas Penal Code, which provides for a special and increased punishment in the event an accused has previously been convicted of a felony offense where an alternate punishment of death is affixed; defendant would respectfully show unto the Court that said Article is unconstitutional and that it denies the accused of due process of law as guaranteed by the Constitution of the United States and the Constitution of the State of Texas in one or more of the following respects (but not limited to):

(1.) Said Article forces the defendant to testify against himself and allows the injection into evidence of prior felony convictions without the defendant first taking the witness stand to testify on his own behalf. Because of the construction of said Statute, it is impossible to erase the prior conviction from the jury's mind in

connection with their determination of the guilt or innocence of the defendant in the instant case.

(2.) Said Article constitutes a cruel and unusual punishment under the terms and provisions of the United States Constitution, in that it in effect allows the State to prosecute the defendant again for a prior crime and puts the defendant in double jeopardy.

[fol. 39] (3.) Said Article denies the defendant due process of law under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States and makes it physically impossible for the defendant to have a fair trial in the instant case, and deprives this defendant of a fair and impartial hearing and thereby denies him due process of law.

(4.) Said Article is in direct conflict with Article 59 of the Texas Penal Code, which provides that increased punishments shall not apply to cases involving capital punishment.

(5.) Article 64 is unclear, vague, and ambiguous in its terms, in that it provides if

"A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life,"

for the reason that before any evidence of prior conviction under the terms and provisions of Article 64 can be used against this defendant, it must be first shown that he is found guilty in the instant case of murder with malice, an offense to which the penalty of death is affixed as an alternate punishment; and under the accusation in this case, it would be possible for the jury to return a verdict of guilty of murder without malice, which does not carry an alternate punishment of death, and therefore would not allow the introduction of evidence of a prior conviction of a felony offense to which an alternate punishment would be death, and would therefore put before the jury evidence of the defendant's prior convictions without his first taking the witness stand and



without such evidence being first admissible for enhancement purposes.

WHEREFORE, premises considered, defendant would respectfully show unto the Court that he is charged under a void and unconstitutional article, and therefore this Court does not have jurisdictional over this matter, and defendant therefore prays that this matter be dismissed, or that the enhancement provisions of this indictment [fol. 40] be stricken and that the defendant be tried only for the offense of murder.

Respectfully submitted,

BILL WALTRIP  
MICHAEL D. MATHENY

/s/ Michael D. Matheny  
Attorneys for Defendant

*[Duly sworn to by Michael D. Matheny jurat omitted in printing (all in italics)]*

ORDER—July 24, 1964

ON THIS the 24th day of July, 1964, came on to be heard and considered the above Plea to the Jurisdiction of the defendant, and after being duly considered by the Court, is hereby overruled, to which action the defendant duly and timely excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 41-51] \* \* \*

[fol. 52]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25040

[File Endorsement Omitted]

[Title Omitted]

DEFENDANT'S OBJECTIONS AND EXCEPTIONS TO THE  
COURT'S CHARGE—Filed August 1, 1964

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the defendant in the above styled and numbered cause and after all the evidence has been introduced and before arguments had begun and after both sides had finally rested and before the court's charge has been given, read, or delivered to the jury, and makes and files and presents to the court these his written objections to the court's charge:

1. Defendant objects to said charge in its entirety and more particularly to the portion thereof in which the deceased named Luvenia Irvine for the reason that the conclusive evidence adduced upon the trial of this cause shows that her legal name was Luvenia Spencer. Said defendant further objects for the reason that said connotation amounts to a comment on the weight of the evidence by the court and shows the jury that the court feels that this woman's name was Luvenia Irvine and not Luvenia Spencer.

2. Defendant objects and excepts to that portion of the charge wherein the court apprises the jury of the fact that this defendant has previously been convicted and/or charged of the offense of murder with malice without the defendant first taking the witness stand. Defendant excepts and objects to each and every allegation in said charge which refers to any evidence of any prior charge and/or conviction for each of the following reasons: (a)



said allegations deny this defendant due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States; (b) said allegations require the defendant to give evidence against himself; (c) said allegations injects into evidence before the jury [fol. 53] evidence of a prior conviction without the defendant having first taken the witness stand; (d) said allegations place defendant in jeopardy for his life twice for the same conviction for crime in violation of the Fifth Amendment of the Constitution of the United States; (e) said allegations deny defendant a fair and impartial trial under the Sixth Amendment of the Constitution of the United States for the reason that it advises the jury of prior misconduct of this defendant before they have determined his guilt or innocence of the primary charge; (f) said allegations inform the jury of matters that have been previously stipulated to the court and are therefore not properly before the jury for their determination, highly prejudicial to the rights of this defendant; (g) said allegations inform the jury that the amount of punishment assessed, if any, by the jury will not necessarily have to be complied with by the Texas Pardon and Parole Board and further advises them of the indeterminate sentence law in the State of Texas.

3. Defendant objects and excepts and points out to the court the absence of any instruction by the court that in the event they find the defendant guilty of murder with malice of the primary charge and further find that he is the same Leon Spencer who was previously convicted of an offense to which capital punishment is affixed as an alternate punishment that the minimum punishment to be assessed by the jury is life in the penitentiary and that the maximum that can be assessed is death without first instructing the jury that said prior conviction cannot be considered in any manner in assessing the defendant's punishment in the primary case of either life or death.

[fol. 54] 4. Defendant objects and points out to the court the absence of an instruction to the jury that if they believe the defendant is guilty of only murder without malice they will acquit him, for the reason that the

State of Texas has made an election to prosecute this defendant under the terms and provisions of Article 64 of the Texas Penal Code, which provides for punishment only in the event the defendant is convicted of murder with malice in the primary offense charged.

5. Defendant further objects to the instructions of the court regarding the punishment of death for the primary offense, or any offense, for the reason that the State has elected to prosecute this defendant under the terms and provisions of Article 64 of the Texas Penal Code, which is ambiguous, and uncertain in its terms for the reason that said Article does not include within its terms and provisions the assessment of death as a punishment for its violation.

6. Defendant further objects to the proposed verdict in the court's charge for the reason that it contains two possible verdicts inflicting the death penalty upon this defendant and is therefore highly prejudicial and misleading to the jury and amounts to a comment on the evidence by the court and indirectly implies to the jury the court's opinion of the penalty which should be inflicted upon this defendant.

[fol. 55] 7. Defendant objects and excepts to that portion of the court's charge wherein it is stated by the court that they must believe beyond a reasonable doubt that the defendant has heretofore been convicted of murder with malice in order to come within the terms and provisions of Article 64 of the Texas Penal Code for the reason that said instruction does not also require that they must also believe beyond a reasonable doubt that the defendant is the same person who has heretofore been convicted of murder with malice.

[fol. 56] 8. Defendant objects and excepts to the court's charge wherein it allows the jury to assess any punishment whatever under Article 64 of the Texas Penal Code for the reason such is not a proper determination for the jury since any conviction any punishment assessed less than death would automatically become life imprisonment, it being stated to the court that the ordinary range of punishment for murder should be submitted to the

jury for their determination upon the facts and circumstances of the case, the subject of repetition being strictly a matter of law for the court.

Respectfully submitted,

MICHAEL D. MATHENY and  
BILL WALTRIP

By:

/s/ Michael D. Matheny  
Attorneys for Defendant

[fol. 57] The above and foregoing objections were made, filed, and presented to the court after all evidence had been introduced and after both the State and the Defendant had rested and before argument had begun, before the court's charge had been given, read or delivered to the jury, and at the time and in the manner prescribed by law, and the court after having read and considered said objections overruled each and all of said objections to which action and ruling of the court the defendant then and there seasonably in open court and at the time and in the manner prescribed by law duly excepted.

/s/ George D. Taylor  
Judge Presiding

[fols. 58-61] \* \* \*

[fol. 62]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

JULY 1964 TERM

No. 25040

[File Endorsement Omitted]

[Title Omitted]

CHARGE OF THE COURT—Filed August 1, 1964

LADIES AND GENTLEMEN OF THE JURY:

• • • • •

[fols. 63-64] • • •

[fol. 65] Our law further provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

Bearing in mind the foregoing instructions, if you find and believe from the evidence beyond a reasonable doubt that the defendant did in Jefferson County, Texas, on or about the 7th day of January, 1964, with malice aforethought, did voluntarily kill the said Luvenia Irvine by shooting her with a gun; and if you further find and believe from the evidence beyond a reasonable doubt that on the 3rd day of April, 1951, the defendant was tried and convicted in the Criminal District Court of Jefferson County, Texas, in Cause No. 17832, on the docket of said court, for the offense of murder with malice, and that said conviction was a final conviction, you will find the defendant guilty as charged in the indictment and assess his punishment at death or confinement in the penitentiary for life.

You are instructed that even though you should find and believe from the evidence beyond a reasonable doubt that the defendant had heretofore been convicted of murder with malice, on the 3rd day of April, 1951, you will not consider that fact as any evidence of the defendant's guilt or innocence of the murder with malice of Luvenia Irvine on or about the 7th day of January, 1964, as alleged in the indictment.

\* \* \*

[fols. 66-71] \* \* \*

[fol. 72]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

[File Endorsement Omitted]

QUESTION BY THE JURY—Filed August 1, 1964

Judge.

Will the defendant be eligible for parole during a life sentence. If so, after how many years?

/s/ Arnold  
Foreman

ANSWER BY THE COURT TO THE JURY

To the Jury:

This is not a matter for the jury's consideration, and the jury will be guided by the charge.

/s/ George D. Taylor  
Judge Presiding

[fols. 73-76] \* \* \*



[fol. 77A]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25040

[Title Omitted]

Indicted for MURDER WITH MALICE AND REPITI-  
TION

MINUTE ENTRY OF VERDICT AND JUDGMENT—  
August 1, 1964

THIS DAY this cause was called for trial, and the State appeared by her District Attorney, and the Defendant LEON SPENCER appeared in person and by Counsel, and both parties announced ready for trial; and the Defendant in open Court pleaded not guilty to the charge contained in the Indictment herein; and thereupon a jury, to-wit:

J. S. Arnold, and eleven others, was duly selected, empaneled and sworn, according to law, who, having heard the indictment read, and the defendant's plea of not guilty thereto; and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit: "We, the jury, find the defendant guilty of murder with malice as charged in the indictment and find that he has previously been convicted of murder with malice as charged in the indictment and assess his punishment at death.

J. S. ARNOLD, Foreman."



It is, therefore, considered and adjudged by the Court that the Defendant Leon Spencer is guilty of the offense of Murder with Malice and Repetition as found by the jury, and that he be punished, as has been determined, by DEATH, and that the State of Texas do have and recover of said Defendant LEON SPENCER all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this Court herein.

GEORGE D. TAYLOR, JUDGE.

[fols. 78-92] . . .

[fol. 93] [File Endorsement Omitted]

[fol. 94]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

No. 25,040

THE STATE OF TEXAS

VS.

LEON SPENCER

STATEMENT OF FACTS—JULY 30, 1964

BE IT REMEMBERED, that the above entitled and numbered cause came on for trial in its regular turn on the docket of the Criminal District Court of Jefferson County, Texas, on the 30th day of July, 1964, the same being a regular term day of the regular July 1964 Term of said Court, before the Honorable George D. Taylor, Judge Presiding, beginning at 3:38 o'clock a.m. of said day, and continuing thereafter until completed, when the following proceedings were had and the following evidence adduced, to-wit:

APPEARANCES:

W. C. Lindsey; Jim Vollers of the Office of the District Attorney, Jefferson County, Texas; counsel for the State of Texas

Mike Matheny; Bill Waltrip, Counsel appointed by court for defendant

[fol. 95] THE COURT: The defendant will stand and the State will read the indictment.

(At this point the indictment was read in open court by counsel for the State of Texas:)

COLLOQUY BETWEEN COURT AND COUNSEL

MR. WALTRIP: If the court please, prior to the entry of any plea, we have objections and a motion we

would like to state to the court and we ask, apologetically, could we have the jury retired just momentarily?

THE COURT: (To Bailiff) Take the jury out.

(At this point the following proceedings were had out of the presence of the jury, to-wit:)

MR. WALTRIP: If it please the court, the defendant, Leon Spencer, objects and excepts to the reading of the second paragraph of the indictment wherein it is alleged that he has heretofore been convicted of a felony, to-wit: murder with malice, for the following reasons: Notifying and allowing the jury to know and to learn of such prior conviction is an absolute denial of due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States and, two, giving the jury such information, whether by reading it or by proving it, requires the defendant to give evidence and testify against himself in this criminal proceeding; and, three, this action and this reading of this portion of the indictment injects into evidence before the jury, evidence [fol. 96] of an extraneous and unrelated offense; four, injection of evidence before the jury of a prior conviction without the defendant having first voluntarily taken the witness stand in his defense; five, notifying the jury and allowing them to know of this prior conviction, places this defendant, Leon Spencer, in jeopardy of his life twice for the same offense; six, we further object to it because this evidence is not only highly prejudicial, but highly prejudicial in that this fact has already been judicially confessed before the court by written stipulation on July 24, 1964, and it is therefore not a controverted fact for submission to the jury or for any further determination or purpose; seven, allowing the jury to know and understand that this defendant has been convicted heretofore of a felony informs the jury of our indeterminate sentence law, our parole laws, and informs them that whatever punishment they may assess may not necessarily be complied with in point of time. By that I mean, evidence of this prior conviction in 1951 of fifteen years imprisonment clearly shows, this being 1964, that the entire fifteen years was not served. Eight, placing

this prior conviction before the jury is an absolute denial of a fair and impartial trial by jury guaranteed by the Sixth Amendment of the Constitution of the United [fol. 97] States. For each and all of these objections we respectfully move the court to instruct the jury they are not to consider the reading of the second paragraph of the indictment having to do with the prior conviction of murder for any purpose. May I have a ruling on this motion?

THE COURT: Does the State desire to argue the matter?

MR. LINDSEY: No, Your Honor, we feel it is merely a reiteration once again of the same matter that has been argued on pretrial.

THE COURT: The objection, which incidentally, was made after the reading of the indictment, on the merits is overruled, and the request for specific instruction to the jury is denied.

MR. WALTRIP: We take exception. Note our exception to both such rulings. We have a further motion; for each and all the foregoing reasons we respectfully move the court to grant a mistrial.

THE COURT: Denied.

MR. WALTRIP: Note our exception. Your Honor, may I have a running bill, if the court please, to any and all testimony regarding this prior offense. By that, I mean, the introduction of all or part of it, or the mention of it by any witness, mention of it by the prosecutor, without the necessity of having to make the same ob-[fol. 98] jections I have just made. In other words, our intention is, each and every time of all or part of this prior offense is brought up we will have the same identical seven or eight objections that I have just stated to the court. May we have a running bill of exceptions throughout the testimony of this trial to statements by the prosecutors in evidence or in the jury argument, without the necessity of my having to each time make the same objections; that is, to any evidence with reference to the prior offense or any questions of similar or like import.

MR. VOLLERS: May I state to the court, Your Honor; of course, we do not waive our right to question the record.

THE COURT: You may have such a bill insofar as it relates to the motion which you have just made and in the light of the court's action in respect to it.

MR. WALTRIP: In other words, our intention is that the bare mention of all or part of anything having anything to do with the prior proceedings, convictions, sentence or the like, of any prior offense, we will not have to object. We now state to the court that our objections will be the same as they were momentarily moments ago. So, do we understand each other, that I might have a running bill as to all matters involving a prior offense [fol. 99] which might be brought up at this trial whether in evidence or in the jury argument?

THE COURT: You may have the running bill which would show your objection to all such possible testimony but it will not affect the record in the case as it may be developed.

MR. WALTRIP: All right.

THE COURT: The defendant will stand. Now, you are Leon Spencer?

DEFENDANT: Yes, sir.

THE COURT: Leon, are you the same Leon Spencer who is named as the defendant in this case?

THE DEFENDANT: I am.

THE COURT: The indictment in which has just been read to you?

DEFENDANT: I am.

THE COURT: How do you plead, guilty or not guilty?

MR. MATHENY: Not guilty.

THE COURT: (To Clerk) Enter a plea of not guilty.

#### OFFERS IN EVIDENCE

MR. VOLLERS: Your Honor, first of all, we offer in evidence certified copies of the judgment and sentence in Cause 17832, styled, The State of Texas vs Leon Spencer.

MR. MATHENY: We object to it for the reasons already stated and further on the ground that there is no fact issue for the jury to determine.

THE COURT: Overruled.



[fol. 100] MR. MATHENY: Note our exception.

MR. VOLLERS: It is my understanding, Your Honor, that the ruling of the court is that the exhibit is admitted in evidence as State's Exhibit Number One?

THE COURT: Yes, the exhibit is admitted in evidence.

(Whereupon, the instrument tendered by counsel for the State of Texas was received in evidence by the Court, marked for identification by the reporter as "State's Exhibit Number One," and is in a separate sealed envelope marked "Volume Two," and constitutes a part of this Statement of Facts:)

MR. VOLLERS: As State's Exhibit Number Two I offer a certified copy of the indictment returned in Cause Number 17832, entitled, The State of Texas vs Leon Spencer.

MR. MATHENY: We object to that for the same reason.

THE COURT: Exhibit Two is admitted. Objection overruled.

MR. MATHENY: Note our exception.

(Whereupon, the instrument tendered by counsel for the State of Texas, was received in evidence by the court, marked for identification by the reporter as "State's Exhibit Number Two," and is in a separate sealed envelope marked "Volume Two," and constitutes a part of this Statement of Facts:)

[fol. 101] MR. VOLLERS: As State's Exhibit Number Three, Your Honor, we offer the portions of the records from the office of Mr. J. C. Roberts, Record Clerk, Texas Department of Corrections.

MR. WALTRIP: We would have the same objections we made earlier and we do have a running bill of exceptions as to all of this?

THE COURT: That is right. Instrument is admitted.

(Whereupon, the instrument tendered by counsel for the State of Texas was received in evidence by the Court, marked for identification by the reporter as

"State Exhibit Number Three," and is in a separate sealed envelope marked "Volume Two," and constitutes a part of this Statement of Facts:)

MR. VOLLERS: As our first witness, Your Honor, I would like to call Mr. Mike Curnan.

MR. WALTRIP: The Rule is in effect, I presume, Your Honor?

THE COURT: The Rule has been invoked.

\* \* \*

[fol. 102] (Whereupon, W. P. "PAT" HAYES, called as a witness for the State of Texas, after having first been duly sworn upon his oath, testified as follows, to-wit:)

[fol. 103] DIRECT EXAMINATION

BY MR. VOLLERS:

\* \* \*

[fol. 104] Q. All right. Now, is this a rule which you have developed in your practice or who has established this rule?

A. This rule has been established through a period of some sixty years or more, beginning with the work in developing the Henry System of Identification in about 1890.

Q. Now, did you compare the characteristics between these two sets of prints which I have asked you about?

A. I have.

Q. And have you found at least twelve similarities between the two prints?

A. I have twelve similarities in each fingerprint, or in all ten fingerprints. Each individual finger has twelve or more similarities.

Q. Now, as I understand from what you have said, Mr. Hayes, a positive identification is possible where there are nine to twelve similarities on one finger, is that correct?

A. Yes, sir.

Q. Has there ever been any exception found to this rule?



A. Not that I know of.

Q. Now, Mr. Hayes, where were you employed on April 3, 1951?

A. I was employed by the Police Department of the City [fol. 105] of Beaumont, Texas.

Q. I will ask you whether or not you know the defendant in this case, Leon Spencer?

A. Yes, sir, I know Leon Spencer.

Q. Did you have occasion to be present in the Criminal District Court of Jefferson County, Texas, on April 3, 1951?

A. I did.

Q. And who was tried on that date?

A. This defendant that is here today, Leon Spencer.

Q. Do you recognize him? Do you remember him from that time?

A. I do.

Q. Did you participate in that case?

A. I testified on the trial of the case, yes, sir.

Q. On that date, Mr. Hayes, what was the result of that trial?

A. He was found guilty and sentenced to serve the term of fifteen years.

Q. Now, for the purpose of clarification, Mr. Hayes—

MR. WALTRIP: Excuse me, counsel. If the Court please, we again urge our same objections. So that we understand each other, our running bill applies to this testimony having something to do with some prior offense.

THE COURT: I understand.

MR. WALTRIP: Thank you, sir.

[fol. 106] Q. Mr. Hayes, for the purpose of clarification to the jury, I show you State's Exhibit Number Three. Would you explain to the jury what these records are? State where those records came from.

A. These are records that come from the Texas Department of Corrections. The first page is the certification. The second page of the record—this is the sentence and the judgment in the State versus Leon Spencer, Cause Number 17832, dated April 3, 1951, on indictment for murder.

Q. Without going through these page by page, let me ask you this, Mr. Hayes; you are familiar with this type of record, are you not?

A. Yes, sir.

Q. Are these copies of records which are kept in the due course of business by the custodian of records—

MR. MATHENY: Your Honor, we object to that. There is no way in the world a man who works for the District Attorney's Office can tell whether or not those are kept by a clerk in Huntsville, Texas, or somewhere else.

THE COURT: The witness can testify only of his personal knowledge.

Q. Do you know Mr. J. C. Roberts?

A. Yes, sir.

Q. Is he the Custodian of the Records of the Texas Department of Corrections at Huntsville?

[fol. 107] A. He is.

\* \* \* \*

[fol. 108] (Whereupon, H. C. JACKSON, called as a witness by the State of Texas, after having first been duly sworn upon his oath, testified as follows, to-wit:)

### DIRECT EXAMINATION

BY MR. VOLLERS:

\* \* \* \*

[fol. 109] Q. I will show you here (exhibiting)—do these appear to be the shells and shell cases which you unloaded from the gun?

[fol. 110] A. Yes, sir, they do.

Q. I believe you said that Mr. Geisendorff marked these also?

A. Yes, sir he made a mark on them.

Q. I will ask you whether or not that on or about April 3, 1951, you were employed by the Beaumont Police Department?

A. Yes, sir.

Q. And on that date did you have occasion to be in this courtroom?

A. Yes, sir, I did.

Q. And do you remember who, if anyone, was on trial at that time?

A. Yes, sir, Leon Spencer.

MR. WALTRIPP: If the court please, we still urge our same objection and I assume our running bill is still in effect as to those objections we made yesterday?

THE COURT: That is correct.

MR. WALTRIP: Thank you.

Q. Were you present here in the courtroom during that trial?

A. Yes, sir.

Q. Do you recall—do you specifically remember that it was the same man that was on trial then?

A. Yes, sir.

[fol. 111] Q. What was he being tried for?

A. Tried for murder.

Q. Was he convicted?

A. Yes, sir.

Q. As a result of the trial?

A. Yes, sir, as a result of the trial he was convicted.

Q. Was he convicted of the offense of murder with malice?

A. Yes, sir.

MR. VOLLERS: No further questions.

## CROSS-EXAMINATION

BY MR. MATHENY:

Q. Mr. Jackson, did you personally make any scratches or markings on the pistol right there?

A. Yes, sir, on the gun I did.

Q. Whereabouts?

A. It is just below the cylinder on the main frame.

Q. Mr. Geisendorff also made a mark?

A. Yes, sir, he did, he marked it.

Q. Where was Leon Spencer when you were making these marks?

A. He was sitting just back of me there drinking a cup of coffee.

Q. The shells, did you personally make markings on the shells?

[fol. 112] - A. No, sir, I didn't mark the shells.

\* \* \* \*

[fol. 113]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 1

MINUTES CRIMINAL DISTRICT COURT,  
JEFFERSON COUNTY, TEXAS  
TERM, A.D. 19

PLEA GUILTY

BE IT REMEMBERED, That on Monday, the  
day of 19 , these came on and was  
held a regular term of the Honorable District Court of  
Jefferson County, Texas, at the Court House thereof, at  
Beaumont, Texas.

Present and presiding: Hon.  
Judge, Criminal District Court of Jefferson County;  
County Attorney;  
District Clerk, and  
Sheriff.

No. 17832

April 3, 1951

THE STATE OF TEXAS

vs.

LEON SPENCER

Indicted for Murder

THIS DAY this cause was called for trial, and the  
State appeared by her DISTRICT Attorney, and the De-

fendant Leon Spencer appeared in person and by Counsel, and both parties announced ready for trial; and the Defendant Leon Spencer in open Court pleaded guilty to the charge contained in the Indictment herein. And thereupon the Defendant Leon Spencer was admonished by the Court of the consequences of his said plea, and said Defendant persisted in pleading guilty, and it plainly appearing to the Court that said Defendant is same, and is uninfluenced in making said plea by any consideration of fear, or any persuasion or any delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and entered of record as the plea of said Defendant herein; thereupon a jury, to-wit: A. B. Swanzy and eleven others, was duly selected, impaneled and sworn, according to law, who, having heard the indictment read, and the Defendant's plea of guilty thereto; and having heard the evidence submitted and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court the following verdict, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit:

We, the jury, find the defendant guilty of Murder, as charged in the indictment, and assess his punishment at confinement in the penitentiary for a term of 15 years.

A. B. SWANZY  
Foreman

It is, therefore, considered and adjudged by the Court that the Defendant Leon Spencer is guilty of the offense of Murder as found by the jury, and that he be punished, as has been determined, by confinement in the State penitentiary for a term of 15 years, and that the State of Texas do have and recover of said Defendant Leon Spencer all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this court herein.

OWEN M. LORD, JUDGE.

[fol. 114]

No. 17832

April 3, 1951

THE STATE OF TEXAS

vs.

LEON SPENCER

THIS DAY this cause being again called; the State appeared by her District Attorney and the Defendant Leon Spencer was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on this same day of this term.

And thereupon the Defendant Leon Spencer was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant Leon Spencer to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the Defendant Leon Spencer who has been adjudged to be guilty of Murder whose punishment has been assessed by the verdict of the jury at confinement in the State penitentiary for a term of 15 years, to be delivered by the Sheriff of Jefferson County, Texas, immediately to the superintendent of the penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Leon Spencer shall be confined in said penitentiary for a term of not less than 2 (two) years nor more than 15 (Fifteen) years in accordance with the provisions of the law governing the penitentiaries of said State."

And the said Leon Spencer is remanded to jail until said Sheriff can obey the directions of this sentence. It further appearing to the Court that this defendant has



been confined of his liberty in the Jefferson County Jail at Beaumont, Texas for a period of One Hundred and Sixty-Five (165) days, It is the further Order of the Court that he be allowed credit for this time on this Sentence.

OWEN M. LORD, Judge Presiding.

[fol. 115] \* \* \*

[fol. 116]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 2

In the Name and by the Authority of the State of Texas:

THE GRAND JURORS for the County of Jefferson, State aforesaid, duly organized as such at the OCTOBER Term, A.D. 1950, of the Criminal District Court of Jefferson County, in said County and State, upon oath in said Court present that Leon Spencer on or about the 19th day of October One Thousand Nine Hundred and Fifty, and anterior to the presentment of this indictment in the County of Jefferson and State of Texas, did then and there unlawfully, voluntarily, and with malice aforethought, kill Annie Bell Spencer, by then and there striking, stabbing, and cutting the said Annie Bell Spencer with a knife,

against the peace and dignity of the State.

/s/ Illegible

[fol. 117]

File No. 17832

THE STATE OF TEXAS

vs.

LEON SPENCER

OFFENSE

MURDER

A TRUE BILL

/s/ Illegible

Foreman of the Grand Jury.

Filed the

day of

, 19

Clerk of the District Court,  
Jefferson County, Texas.

By /s/ Illegible, Deputy

Amount of Bail, \$.....

## NAME OF WITNESSES

Willie Tolbert, 633 Forsythe, Beaumont  
 T. A. Floyd, 706 Ave. E  
 Mrs. Lena Kattawan, 1347 Railroad Ave.  
 N. M. Campise, 2610 Railroad or 660 W. Pipkin  
 Mrs. N. M. Campise, 2610 Railroad or 660 W. Pipkin  
 Martin DeMary, 6155 Garner Road  
 James Spencer, 935 Sherman  
 Beatrice Wilson, 350 Jefferson Alley  
 Elbert Mayfield, Willard Undertaking Co.  
 Frank Englon, 596 McGovern  
 Pat Hayes, City Officer  
 Dr. F. W. Sutton  
 L. M. Hamm, City Officer  
 H. C. Jackson, City Officer  
 Inez Landry, 1000 Blk, Sherman  
 Fred Jones,  
 Jessie Wallace  
 Elsie Clinton,

[fol. 118] \* \* \*

[fol. 119]

IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 3

U.S. Rev. Statutes, Sec. 906. Attestation by Custodian,  
Certificate of Presiding Judge, Certificate of Clerk to  
official character of Judge.

THE STATE OF TEXAS     )  
COUNTY OF WALKER     )

I, J. C. ROBERTS, HEREBY CERTIFY THAT I AM  
THE Record Clerk of the Texas Department of Cor-  
rections, a penal institution of the State of Texas, situ-  
ated in the County and State aforesaid. That in my legal  
Custody as such officer are the original files and records  
of persons heretofore committed to said institution: that  
the (X) photograph (X) fingerprints and (X) commit-  
ments attached hereto are copies of the original records of  
LEON SPENCER, No. 119454 a person heretofore com-  
mitted to said penal institution and who served a term  
of imprisonment therein: that I have compared the at-  
tached copies with their respective originals now on file  
in my office and each thereof contains, and is a full, true,  
and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my  
hand seal this 15th day of July, 1964.

/s/ J. C. Roberts, Record Clerk

THE STATE OF TEXAS     )  
COUNTY OF WALKER     )

I, AMOS A. GATES PRESIDING JUDGE OF THE COUNTY COURT, do hereby Certify that J. C. ROBERTS, whose name is subscribed to the above Certificate, was at the date thereof, and is now Record Clerk of the Texas Department of Corrections, and is the legal keeper and the officer having the legal custody of the original records of the said Texas Department of Corrections: that the said Certificate is in due form and that the signature subscribed thereto is his genuine signature.

IN WITNESS WHEREOF, I have hereunto subscribed my name in my official character as such Judge, in the County and State aforesaid, this the 15th day of July, 1964.

/s/ Amos A. Gates, JUDGE  
of the County Court, Walker County, Texas

THE STATE OF TEXAS     )  
COUNTY OF WALKER     )

I, J. L. FERGUSON CLERK OF THE COUNTY COURT of the County of Walker, State of Texas, which Court is a court of records having a seal which is annexed hereto, do certify that AMOS A. GATES whose name is subscribed to the foregoing Certificate of the due Attestation, was at the aforesaid subscribing, the same Judge of the County Court aforesaid, and was duly commissioned, qualified and authorized by LAW to execute the said Certificate, and I do further certify that the signature of the above named Judge of the said Certificate of due Attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the seal of the County Court at my office in said County, this the 15th day of July, 1964.

/s/ J. L. Ferguson, CLERK  
County Court, Walker County, Texas



## THE STATE OF TEXAS

vs.

LEON SPENCER

April 3, 1951

## INDICTED FOR MURDER

This day this cause was called for trial, and the State appeared by her District Attorney, and the Defendant Leon Spencer in person and by counsel and both parties announced ready for trial and the Defendant Leon Spencer in open court pleaded guilty to the charge contained in the indictment herein. And thereupon the Defendant Leon Spencer was admonished by the court of the consequences of his said plea, and said Defendant persisted in pleading guilty, and it plainly appearing to the court that said Defendant is sane, and is uninfluenced in making said plea by any consideration of fear, or any persuasion of any delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the court received and entered of record as the plea of said Defendant herein; thereupon a jury to-wit: A. B. Swanzy and eleven others was duly selected, impaneled and sworn, according to law, who having heard the indictment read, and the Defendant's plea of guilty thereto; and having heard the evidence submitted and having been duly charged by the court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open court the following verdict, which was received by the court, and is here now entered upon the minutes of this court, to-wit:

We, the jury, find the defendant guilty of Murder, as charged in the Indictment, and assess his punishment at confinement in the penitentiary for a term of 15 years.

A. B. SWANZY  
Foreman



It is, therefore, considered and adjudged by the court that the Defendant Leon Spencer is guilty of the offense of Murder as found by the jury, and that he be punished as has been determined, by confinement in the State Penitentiary for a term of 15 years, and the the State of Texas do have and recover of said Defendant Leon Spencer all costs in the prosecution expended, for which execution will issue, and that said Defendant be remanded to jail to await the further order of this Court herein.

[fol. 122] \* \* \*

[fol. 123]

IN THE DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS  
APRIL TERM, 1951

No. 17832

April 3, 1951

THE STATE OF TEXAS

VS.

LEON SPENCER

This day this cause being again called, the State appeared by her District Attorney, and the defendant Leon Spencer was brought into open court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on this same day of this term. And thereupon the defendant was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon the

Court proceeded, in the presence of the said defendant Leon Spencer to pronounce sentence against him as follows: It is the order of the Court that the defendant Leon Spencer who has been adjudged to be guilty of Murder and whose punishment has been adjudged at confinement in the penitentiary for a term of 15 years, be delivered by the Sheriff of Jefferson County, Texas, immediately to the Superintendent of Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and the said Leon Spencer shall be confined in said penitentiaries for a term of not less than 2 (two) years nor more than 15 (Fifteen) years in accordance with the provisions of the law governing the penitentiaries of said State. And the said Leon Spencer is remanded to jail until said Sheriff can obey the directions of this sentence.

It further appearing to the Court that this defendant has been confined of his liberty in the Jefferson County Jail at Beaumont, Texas for a period of One Hundred and Sixty-Five (165) days. It is the further Order of the Court that he be allowed credit for this time on this sentence.

OWEN M. LORD,  
Judge Presiding.

[fol. 124] \* \* \*

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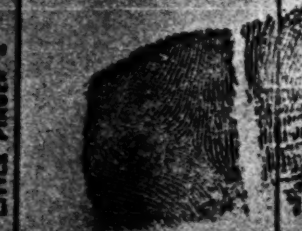
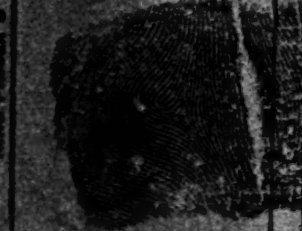
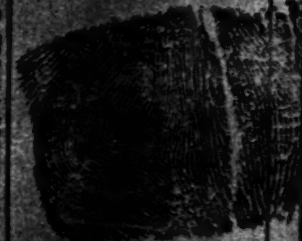
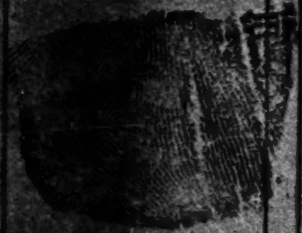
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MIDDLE FINGER 3

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LITTLE FINGER 5



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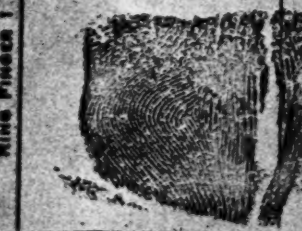
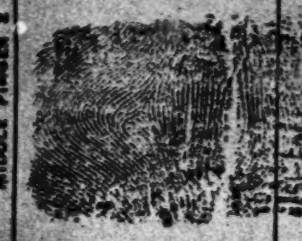
THUMB 1

INDEX FINGER 2

MIDDLE FINGER 3

RING FINGER 4

LITTLE FINGER 5



SIGNATURE OF PERSON TAKING PRINTS

LEFT HAND

LEFT THUMB

RIGHT THUMB

SIGNATURE OF PERSON FINGERPRINTED

RIGHT HAND

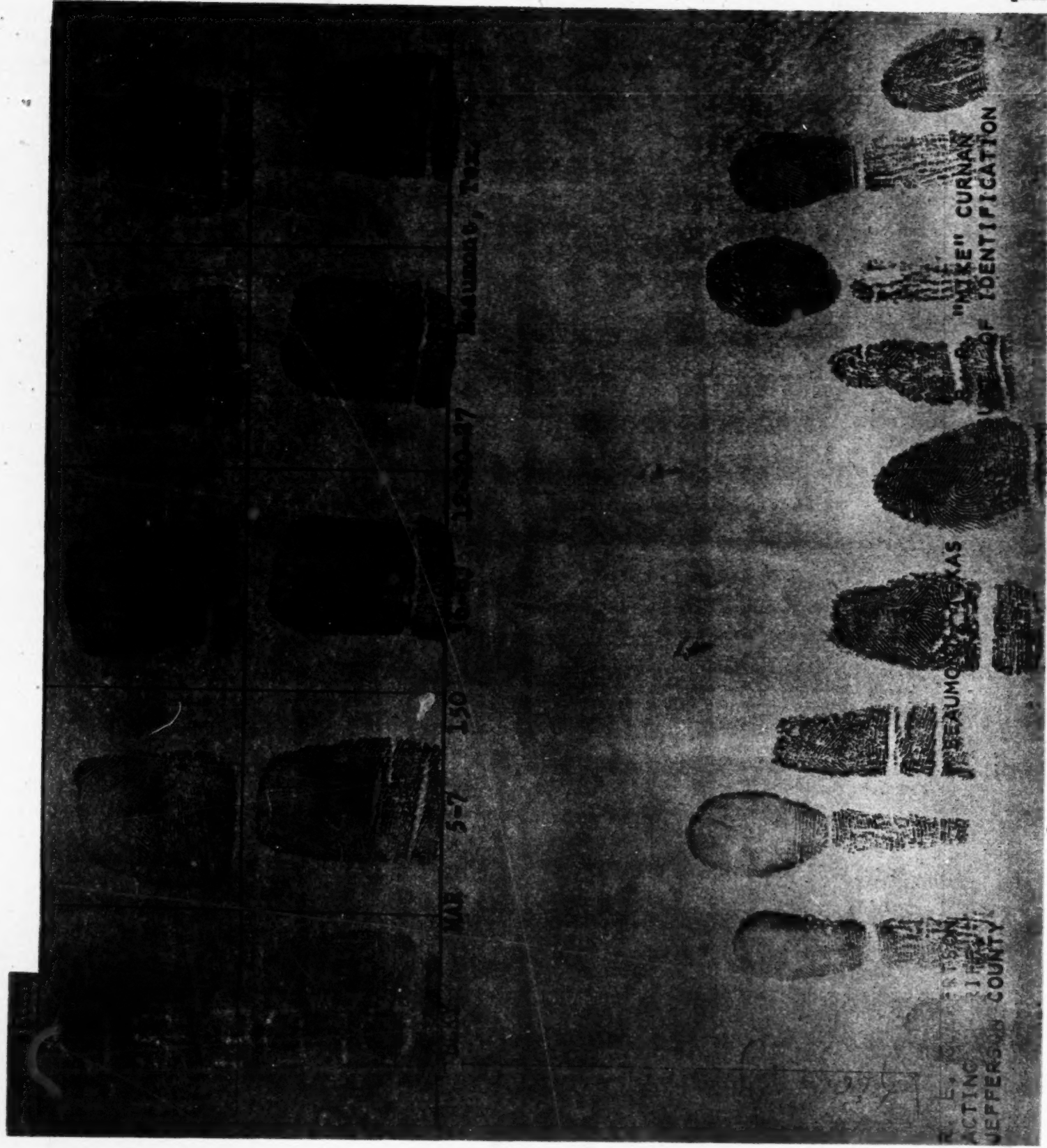
*Leon Spencer*



IN THE CRIMINAL DISTRICT COURT  
OF JEFFERSON COUNTY, TEXAS

State's Exhibit No. 4

580





[fol. 127]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 37,921

LEON SPENCER, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

APPEAL FROM JEFFERSON COUNTY

OPINION—March 17, 1965

The offense is murder; the punishment, enhanced under Art. 64, V.A.P.C., death.

Art. 64, V.A.P.C. provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

The testimony reflects that appellant and deceased had lived together for about four or five years and had separated in October or November, 1963. On January 7, 1964, around 7:30 P.M., deceased was at her home in the City of Beaumont with her two sons, aged fourteen and eight, and her daughter, about eighteen years of age, and her daughter's twenty month old baby. As deceased was lying on the bed playing with the baby the appellant walked into the house, entered the room where deceased was and almost immediately fired one shot with a pistol. The shot hit deceased in the face, and she fell off the bed. Deceased's daughter, who was in the room at the time this occurred, jumped over the bed and lay down on top of deceased to protect her. At that time appellant walked around the bed, pulled deceased's daughter up and fired four more shots into deceased's face and head. Appellant was attacked at that time by deceased's fourteen year old son who had seen part of this occurrence. Appellant knocked the knife out of the son's hand and walked out of the front door of the house where he stopped and appeared to be either loading or unloading the pistol. The deceased's daughter ran out of the house after him and



[fol-128] when she fell down, appellant looked back at her and told her her mother was no good and then he grinned.

After leaving the house where the shooting occurred, appellant walked into the Sheriff's Office at approximately 8:15 P.M. and had in his possession a .22 caliber pistol containing three live shells and three spent cartridge cases. This pistol was proved to have been purchased by the appellant from Phillips Pawn Shop in the City of Beaumont between 4:00 P.M. and 5:30 P.M. on January 7, 1964.

The cause of the deceased's death was established by medical testimony showing that she had died as a result of gunshot wounds to the brain.

The State proved that the defendant had been previously convicted of the offense of murder with malice as alleged in the indictment.

We find the evidence sufficient to sustain the verdict.

Appellant offered to stipulate, prior to the trial, that he had been previously convicted of murder as alleged in the second count of the indictment. Upon making this offer appellant moved the trial court to instruct the state not to read the portion of the indictment which referred to the prior conviction and not to offer any proof of said prior conviction, which motion was denied.

Appellant also objected to the reading of the indictment, and after the reading of the indictment alleging the prior conviction, he moved for a mistrial and also objected to any and all testimony in regard to the first conviction.

Appellant bottoms the foregoing contentions upon the theory that the trial court denied him due process of law by sanctioning this procedure on the part of the state before the determination of his guilt on the primary offense. He contends that there was no fact issue for [fol. 129] the determination of the jury as to his identity or the validity of the prior conviction.

Appellant also contends that Art. 64, V.A.P.C. is unconstitutional for the reason that it places the accused in double jeopardy in that this statutory provision uses the fact of the preceding offense to establish an element of the primary offense.

We shall dispose of these three related contentions together, as the parties have done in their briefs. We have consistently held that the procedure of reading an indictment to a jury showing that the person on trial has been previously convicted is not a violation of due process of law. We held in *Wright v. State*, 364 S.W.2d 384, a case in which the appellant there offered to judicially confess and stipulate as to his former conviction instead of the state offering proof of the prior conviction, that the state could not be prevented from making proof of the prior alleged conviction. Wright's conviction was under Art. 64, V.A.P.C.

In *Pitcock v. State*, 367 S.W.2d 864, this Court, speaking through this scrivener, did announce a new rule in those cases where *"the jury has no choice in imposing punishment if it finds the appellant guilty and that he has been previously convicted."* We said: "Thus, if accused stipulates the prior conviction, that issue is resolved and the question of guilt is all that remains." We are convinced of the soundness of this rule, but *it is not applicable to cases coming under Art. 64, supra.* The jury does have a choice in imposing punishment under Art. 64, as may be seen from the foregoing terms of this article.

Since appellant's contentions have been before this Court numerous times, we shall not enter into a detailed discussion. His contentions have been adversely decided by this Court in the rather recent case of *Crocker v. State*, 385 S.W.2d 392, and the very recent case of *Wig-[fol. 130] ginton v. State*, No. 37,645, and cases there cited.

We adhere to these prior holdings and overrule appellant's contentions.

We have examined with great care appellant's remaining contentions, but we find no error reflected by them. It would contribute nothing to the jurisprudence of this state by discussing them here.

Finding no reversible error, the judgment is affirmed.

MCDONALD, Presiding Judge

(Delivered March 17, 1965.)

[fol. 131]

## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S CERTIFICATE AS TO JUDGMENT AND OVERRULING  
OF APPELLANT'S MOTION FOR REHEARING—June 3, 1965

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 37,921 styled:

LEON SPENCER, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

judgment of the Criminal District Court of Jefferson County, was affirmed on March 17, 1965, Appellant's Motion for Rehearing overruled, without written opinion, May 5, 1965, and on May 7, 1965, mandate issued.

Therefore, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on May 5, 1965, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of Said Court, at office, in Austin, Texas, the 3rd day of June, A.D., 1965.

[SEAL]

/s/ Glenn Haynes,  
GLENN HAYNES, Clerk  
Court of Criminal Appeals of Texas

[fol. 132]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 37921

[Title Omitted]

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES—Received June 3, 1965

1.

NOTICE is hereby given that Leon Spencer, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals in its opinion and judgment rendered March 17, 1965, affirming the judgment of the Criminal District Court of Jefferson County, Texas, in the above matter, Motion for Rehearing denied without written opinion May 5, 1965.

This appeal is taken pursuant to 28 U.S.C.A. 1257, § 1 & 2.

Appellant was convicted of the crime of murder with malice under the Texas Penal Code with the punishment being enhanced under the terms and provisions of Article 64, and has been sentenced to death in the electric chair and is presently confined at the county jail in Beaumont, Jefferson County, Texas.

2.

This appeal is being made in forma pauperis by the Appellant for the reason that he had been confined in the county jail of Jefferson County, Texas, since January, 1964, and has been represented throughout his trial in this matter by Court appointed attorneys and has funds of no kind and is unable to pay for a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court of the United States, and in the event the Supreme Court of the United States allows this [fol. 133] appeal, it is respectfully requested that the Clerk of the Court of Criminal Appeals of the State of Texas forward for transmission to the Clerk of the Supreme Court of the United States all of the papers on file herein.

The following questions are presented by this appeal:

Do Article 64 of the Texas Penal Code and Article 642 of the Vernon's Annotated Code of Criminal Procedure and the accompanying procedure which requires the reading of the indictment by the prosecuting attorney after the impanelment of the jury and the presentment of proof to the jury of a prior conviction of murder with malice of a former wife prior to the determination of the guilt or innocence of the defendant on the primary charge of murder with malice of his wife deny such defendant due process of law and a fair and impartial jury as guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States of America?

Have the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States of America been violated where the defendant in a criminal proceeding in a State court is convicted in a state by statute which requires compliance with the Constitution of the United States as to guaranteeing defendants due process of law by allowing the State to inform prospective jurors of a prior conviction and to read portions of the indictment to the jury alleging a prior offense and to establish by proof the prior conviction before the jury before the determination of the guilt or innocence of the defendant on the primary offense and by further allowing the jury to decide as to the validity of the prior offense and the identification of the defendant at the same time it is determining the guilt or innocence of the defendant on the primary charge?

Respectfully submitted,

/s/ Michael D. Matheny

/s/ Louis V. Nelson

Attorneys for Appellant

1014 San Jacinto Bldg., P.O. Box 1632  
Beaumont, Texas

[fol. 134]

[Certificate of service (omitted in printing)]



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[fol. 135]

SUPREME COURT OF THE UNITED STATES

No. 273 Misc., October Term, 1965

LEON SPENCER, APPELLANT

v.

TEXAS

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS—January 31, 1966

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

[fol. 136]

## SUPREME COURT OF THE UNITED STATES

No. 273 Misc., October Term, 1965

LEON SPENCER, APPELLANT

v.

TEXAS

APPEAL from the Court of Criminal Appeals of the State of Texas.

ORDER POSTPONING JURISDICTION—January 31, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits. The case is transferred to the appellate docket as No. 967 and placed on the summary calendar and set for oral argument immediately following No. 128 Misc.